SENATE JUDICIARY
Exhibit No. 3
Date 2-19-07
Bill No. SB 476

MAKE UPL A CRIME

For the record I am Jerry O'Neil, representing Senate District Number 3. My district includes a major part of the unincorporated Northern Flathead County.

I understand that legislators are not supposed to introduce legislation which affects them personally, but this legislation is definitely influenced by what has happened to me in my endeavors to make our justice system better serve the public.

In 1997 Ernest Wilcock was sitting in jail waiting trial on a felony charge and was represented by a public defender when his wife filed for divorce. His public defender was unable to help him with the divorce and Ernest was unable to get any other licensed attorney. His need for and inability to get an attorney is stated in the *Affidavit of Ernest B. Wilcock*:

1. Respondent is presently incarcerated in the Flathead County jail and it appears likely that Respondent will remain incarcerated there for the immediate future.

2. Respondent has been served a summons and petition for dissolution of marriage in this cause.

3. Respondent is not versed in marital law and is not capable of representing himself in this action.

4. Respondent has attempted to contact by phone over one-half of the attorneys listed in the Kalispell telephone book that advertise they practice family law. Because Respondent is in jail he has been forced to phone collect and some of the listed attorneys refused to accept his phone call. None of the contacted attorneys have agreed to represent Respondent in this case.

5. While Respondent has some personal property, he does not have any cash with which to pay an attorney. The major assets of the marriage include a 1979 pickup with camper, in which it is likely Respondent will need to reside when he is released from jail; stocks at Wal-Mart, which likely have a value of about $1,200.00, which are currently in Wife's possession, an antique bed and dresser which Wife is currently using as furniture; an antique gramophone which is in Wife's possession and an antique 45-70 rifle, also in Wife's possession. Respondent believes the best way to pay attorneys without depriving Wife and the children of the essentials of life, and while keeping Wife's retirement intact, would be to use the antique 45-70 rifle.

6. Respondent phoned Jerry O'Neil who advertises as a typing service in the yellow pages. Jerry O'Neil was willing to accept Respondent's collect phone calls and is the only person Respondent has located who is willing to accept Respondent's personal property in payment for his services.

7. While Jerry O'Neil is not licensed to practice law in the State of Montana, he is licensed as an advocate and counselor before the Blackfeet Tribal

Court and before the Confederated Salish and Kootenai Tribal Court. These courts follow the Montana statutes which relate to family law. In addition, Jerry O'Neil has drafted, lobbied for, and succeeded in getting enacted as law in the Montana Legislature, statutes regarding dissolution of marriages. Mr. O'Neil has also participated in the formulation of the Montana Child Support Guidelines. Jerry O'Neil is knowledgeable about Montana laws relating to families and divorce.

8. Jerry O'Neil is the only advocate Respondent has available and Respondent desires that Jerry O'Neil be allowed to represent him in this cause.

At a hearing held on December 17, 1997, when considering how she could best allow Ernest to access the Court, the Honorable Katherine R. Curtis authorized me to sit at the counsel table with, and give advice to, Ernest:

> Mr. O'Neil, I cannot admit you to the practice of this court. The laws of the State of Montana do not allow me to do that. You may stay where you are, you may advise Mr. Wilcock in whatever manner you and he deem appropriate, but he's got to speak for himself; okay?

Transcript of Proceedings, Flathead County Dist Crt, December 17, 1997, No. DR-97-536(B), pg 4, ln 3; (Pet. App. 86-95, at 88).

As further authorization of my services, later in the proceedings (Pet. App. 92-93), when Ernest asked the Court to appoint him counsel, Judge Curtis responded:

> Okay. Mr. Wilcock, we don't have procedures in Flathead County for appointing counsel for people in civil cases, which is what this is. Okay? Obviously, in criminal cases we do because you've had a lawyer appointed to represent you.
>
> But in civil cases, cases concerning dissolution of your marriage and matters related to your children, we don't have the resources for the taxpayers of Flathead County to pay for another lawyer for you. Okay?
>
> So you're welcome to represent yourself. You're welcome to have Mr. O'Neil advise you. He can prepare documents for you. He knows what practicing law is, what practicing law isn't, and so, you know, he can advise you. He can't speak for you. But you strike me as someone who is fairly capable of speaking for himself.

With the Court's authorization, I sat at counsel table with Ernest and prepared the necessary documents for him. In Montana, no matter how onerous, one cannot escape their child support obligation by going bankrupt. With my help Ernest's child support was

calculated on his prison earnings, rather than his pre-prison earnings, thus placing him in a viable position to continue his life when he gets out of prison. Neither Judge Curtis nor Ernest had any problem with the help I gave him.

Because of concerns relating to another paralegal, on February 13, 2001, three years after I helped Ernest, Judge Curtis, along with Judges Lympus and Stadler, wrote the Commission on Unauthorized Practice of Law, stating:

> There are two individuals in Flathead County who advertise themselves as "independent paralegals" and who routinely prepare and file pleadings for people initiating or responding to dissolution or child custody proceedings. For a period of time, we directed the Clerk of Court to not accept pleadings prepared by one of these persons (Connie Monroe), because her papers were very deficient in many respects. She apparently has now gotten some training and is asking us to once again accept her papers. We are very reluctant to do so because it would then appear that we were sanctioning the unauthorized practice of law, but we cannot then justify allowing the other individual (Jerry O'Neil) to continue with essentially the same practice.
>
> - - -
>
> We have been somewhat reluctant in the past to raise this matter because of our concern that the legal system is becoming progressively unaffordable for many people, and these paralegals are more affordable. However, our local bar, with the assistance of the local Legal Services office, has just begun a *pro bono* project to assist many of these people in getting good, affordable legal advice, so it seems timely to request the Commission to investigate to determine if, in fact, there are litigants who are receiving and acting upon legal advice from these non-lawyers.

February 13, 2001 letter from State of Montana Eleventh Judicial District to James G. Hunt, Chair, Commission on Unauthorized Practice of the Supreme Court of the State of Montana. Pet. App. 67-68.

In response to the February 13, 2001 letter from the Flathead County judges, in July 2002, the Montana Supreme Court's Commission on the Unauthorized Practice of Law filed a *Petition for Finding of Civil Contempt and for Permanent Injunction* against me (Pet. App. 63-66). The Commission requested the Court to find me in civil contempt for engaging in the unauthorized practice of law. Acts alleged included:

> He prepares affidavits of indigency for customers who have paid him to prepare the pleadings. O'Neil attempts to appear on behalf of his customers

in court and asserts that he is entitled to appear on behalf of his customers. He advises his customers during court proceedings. (Pet. App. 65).

In response to the charges against me I demanded a jury trial. This right was denied to me based upon 37-61-210, which makes the unauthorized practice of law a contempt of court. Contempts of court do not qualify for such due process as a jury trial.

On January 7, 2005 the Montana Eleventh Judicial District Court, the Honorable Deborah Kim Christopher presiding without a jury, entered a *Judgment and Permanent Injunction* against me. The order was based on the help I had given to Ernest Wilcock. At page 3 of its *Judgment and Permanent Injunction* (Pet. App. 34, 35), based on the help I had given to Ernest Wilcock, it states:

> 11. O'Neil attempts to appear on behalf of others in court by written and verbal motions to the court. . .
> 12. O'Neil has appeared at counsel table, or in the courtroom, and advised others during court proceedings.

On page 9 of the *Judgment and Permanent Injunction*, Judge Christopher precludes me from helping others in the future who might be situated similar to how Wilcock was situated when she ruled that an indicia of the practice of law which she is enjoining me from includes:

> 3(c). Appearing, or attempting to appear, as a legal representative or advocate for others in a court or tribunal of this state. (Pet. App. 37).

On appeal, the Montana Supreme Court agreed with Judge Christopher on both items. It closed the door on my giving any future help to those without the means to access the court. In its *Opinion* which was filed on November 8, 2006, it stated:

> Just as O'Neil has no First Amendment right to practice law without a license, his customers have no First Amendment right to unlicensed legal representation. The Supreme Court has recognized a First Amendment right to receive legal advice, but that right is limited to clients of duly qualified attorneys consistent with "the State's interest in high standards of legal ethics." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 225 (1967). The unauthorized practice statutes are narrowly tailored to target only the provision of legal services in Montana by individuals who have not proven through examination and admission to the bar that they "are qualified and possess a familiarity with [Montana] law." *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 611-12 (9th Cir. 2005). There remain ample alternative channels for providing legal services to O'Neil's

customers – the thousands of licensed attorneys in Montana.
Opinion, Montana Supreme Court Commission on UPL v. O'Neil, Pet. App. 28.

> It has long been held that prisoners may help (other) prisoners access the courts.
>
> The preparation of petitions must never be considered the exclusive prerogative of the lawyer. Laymen – in and out of prison – should be allowed to act as "next friend" to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as being a member of the Bar. . . Reasonable access to the courts is a right (secured by the Constitution and the laws of the United States), being guaranteed as against state action by the due process clause of the Fourteenth Amendment." ***Johnson v. Avery***, 393 U.S. 483, (1969).

There is a fundamental right to access the courts, which attaches to those seeking a dissolution of their marriage:

> In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the bona fides of both appellants' indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, [401 U.S. 371, 383] for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to a judicial process entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

Boddie et al. v. Connecticut et al., 401 U.S. 371 (1971)

Ernest Wilcock had a constitutional right to access the court when he was incarcerated in the Flathead County jail on a felony violation when his wife sued him for dissolution of their marriage. The divorce case went in front of the Honorable Katherine Curtis, District Judge of the Eleventh Judicial District. He was a pauper and did not have access to a law library or the ability to prepare the necessary documents. The court would not appoint an attorney for him and he was unable to find one who would take the dissolution case on a pro bono basis. I was the only help available for Wilcock.

Recognizing the necessity of Wilcock having some help, Judge Curtis allowed me

to sit at counsel table with him and to prepare the documents which needed to be prepared for him.

Prison authorities can apply restrictions to such activity when such restrictions are reasonably related to legitimate penological interests (***Lewis v. Casey***, 518 U.S. 343 (1996). But neither the Court, the detention system, nor Wilcock found any problem with the assistance I provided.

Instead of allowing prisoners such as Ernest Wilcock to have help when appearing before the courts with civil matters, the Montana Supreme Court agreed with Judge Christoper. To justify preventing me, and others similarly situated, from helping litigants such as Ernest Wilcock, in its *Opinion,* the Montana Supreme Court states:

> There remain ample alternative channels for providing legal services to O'Neil's customers—the thousands of licensed attorneys in Montana. (Pet. App. 28).

The point they are attempting to make is that it is acceptable for them to infringe the First Amendment rights of myself, my clients and my constituents because "they leave open ample alternative channels for communication of the information" such as was required of the Arizona respondents in *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 611-12 (9th Cir. 2005).

But there are **not** "ample alternative channels for communication of the information" available in Montana. As stated in the *Affidavit of Ernest B. Wilcock*:

> Jerry O'Neil is the only advocate Respondent has available and Respondent desires that Jerry O'Neil be allowed to represent him in this cause.

Affidavit of Ernest B. Wilcock, Pet. App. 101, 102.

The 3 judges of the Flathead County District Court did not allege there was any other help available during the time I helped Sparks and Wilcock. On February 13, 2001, when they wrote the letter to the Montana Supreme Court Commission on the Unauthorized Practice of Law, they were anticipating that the integrated bar would be expanding its services so the services of independent paralegals would not be necessary in the future. They stated:

> We have been somewhat reluctant in the past to raise this matter because of our concern that the legal system is becoming progressively unaffordable for many people, and these paralegals are more affordable. However, our local bar, with the assistance of the local Legal Services

> office, has just begun a *pro bono* project to assist many of these people in getting good, affordable legal advice, so it seems timely to request the Commission to investigate to determine if, in fact, there are litigants who are receiving and acting upon legal advice from these non-lawyer.

Letter, 11th District Judges to UPL Commission, Pet. App. 67

While the 3 judges might have been writing to the Unauthorized Practice Commission with the noblest of intentions, the result does not stand Constitutional muster. The wonderful system they thought they had established in 2001 was still woefully inadequate in 2005. This is according to the study: *Legal Needs of Low Income Households in Montana, Final Report - 2005*, by D. Michael Dale. The report is available at:
http://www.montanabar.org/mylegalnews/pdfs/ Full_Report.pdf,

The report states:

> The Montana Legal Needs Study has identified a huge unmet need for civil legal services among low income families in Montana – probably in excess of 200,000 cases each year for which no legal assistance is available. These legal problems are seen to be highly important to the families involved. Where access to counsel is available, an encounter with the legal system is likely to produce relatively positive attitudes towards the institutions of the law. However, the wide-spread inability to obtain representation is creating very negative attitudes with respect to the legal system.

If for the sake of argument we would speculate that someday the integrated bar would be able to take care of all the unmet legal needs of society, at that time it might be Constitutionally permissible for the Montana Supreme Court Commission on the Unauthorized Practice of Law to bar me from sitting at counsel table with, and preparing documents for, indigent prisoners. But to forbid me from the act of petitioning the court for permission to help someone who has unsuccessfully attempted to retain counsel? That is ludicrous! How will they ever know their system is not working if they bar litigants from asking for help when it isn't?

According to MCA § 37-61-210, "unauthorized practice of law" is a contempt of court. How can Judge Christopher find, and the Montana Supreme Court endorse, that my actions In Re the Marriage of Wilcock, DR-97-486(B), which were done under the authority of the Wilcock court, and protected under the tenet of *Bounds v. Smith*, are a contempt of court and constitute the unauthorized practice of law when those actions were specifically authorized by Judge Curtis in the court where they took place?

Opponents' own expert, Mr. Mike Alterowitz, when addressing the propriety of my requesting the court for permission to help litigants, answered my questions as follows:

> Q. Okay. If I were to have filed papers asking the court to let me appear as a non-attorney, would that be appearing in a court?
>
> A. To let you appear as a non-attorney?
>
> Q. Yeah.
>
> A. I guess you are, at that point, asking the court for permission to appear. So in that situation, that limited kind of document is probably not such an appearance.
>
> Q. Thank you.
>
> A. Because it's respecting - - The point there is it's respecting the authority of the court. It's saying, I respect the authority of the court to determine who may appear before it, and it's ceding to that authority. And in my mind, that's very appropriate. That is exactly what we all need to do is to cede to that authority.

I am confident a jury would have refused to rule that the help I provided to Ernest Wilcock with the Court's permission constituted the unauthorized practice of law. With the definition of practice of law so vague, it is imperative that we allow due process to those charged with the unauthorized practice of law. Please give a "do pass" recommendation to Senate Bill 476.